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DEBORAH DI GRAZIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
SAN JOSE DIVISION

DEBORAH DI GRAZIA, a widow,

Plaintiff,

vs.

SAZERAC COMPANY, INC., a Louisiana
corporation; and DOES 1-20,

Defendants.

No. 5:08-CV-01562 JW

**JOINT CASE MANAGEMENT
CONFERENCE STATEMENT AND
PROPOSED ORDER**

Date: July 7, 2008
Time: 10:00 a.m.
Courtroom: 8
Judge: Hon. James Ware

Pursuant to Civil Local Rule 16-9, the parties to the above-entitled action, Plaintiff Deborah di Grazia ("Mrs. di Grazia") and Defendant Sazerac Company, Inc. ("Sazerac") together submit this Joint Case Management Conference Statement, with Proposed Order, and respectfully request that the Court adopt it as the Case Management Order in this case.

1. JURISDICTION AND SERVICE

Defendant asserts that this Court has subject matter jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. §§ 1332, 1441, and 1446 because Mrs. di Grazia is a resident of Monterey County, California and Sazerac is incorporated in the state of Louisiana and has its principal place of business in New Orleans, Louisiana. Presently there are no issues regarding personal jurisdiction or venue, and all parties have been served.

1 **2. FACTS**

2 **Brief Chronology.** Herradura Tequila, S.A. (“Herradura”), a Mexican
3 corporation, is a producer, bottler and exporter of tequila known under the names Herradura Gold,
4 Herradura Silver, Herradura Anejo and other brands (collectively referred to as “Herradura
5 Brands” or “the Brands”). On or about April 28, 1981, Herradura appointed Mrs. di Grazia’s
6 husband, Mr. Loris di Grazia, as its exclusive representative to import and sell the Brands in the
7 United States. Mrs. di Grazia alleges that, from that time and until his death, Mr. di Grazia had a
8 strong business relationship and friendship with the president of Herradura, Guillermo Romo.

9 On October 21, 1991, Mr. di Grazia entered into an agreement with Sazerac (the
10 “Sazerac-di Grazia Agreement”). Pursuant to the Sazerac-di Grazia Agreement, Mr. di Grazia
11 relinquished his rights as the exclusive representative of Herradura in the United States, in order
12 to allow Sazerac to acquire that role. The Sazerac-di Grazia Agreement was conditioned on
13 Sazerac entering into a separate agreement with Herradura to import and to distribute Herradura
14 Brands. In exchange, Sazerac agreed to pay Mr. di Grazia a contingent initial payment, plus
15 subsequent payments based upon purchases of the Brands by Sazerac.

16 At the same time, on October 21, 1991, Sazerac entered into an agreement with
17 Herradura (the “Sazerac-Herradura Agreement”). Under the terms of the Sazerac-Herradura
18 Agreement, Herradura appointed Sazerac as the exclusive importer, seller, marketer and
19 distributor of Herradura Brands in the United States. In exchange, Sazerac agreed to accept such
20 appointment and to perform its obligations under the Sazerac-Herradura Agreement. For
21 approximately fifteen years, Sazerac made purchases of Herradura Brands pursuant to the
22 Sazerac-Herradura Agreement, and it made regular payments to Mr. di Grazia based on those
23 purchases.

24 Mr. di Grazia died in February 2006. Sazerac continued to pay Mrs. di Grazia, his
25 widow, pursuant to the terms of the Sazerac-di Grazia Agreement.

26 At some point in 2006, Brown-Forman Corp. (“Brown-Forman”) acquired
27 Herradura. Brown-Forman is a producer and distributor of spirits. Mrs. di Grazia alleges that
28 either Brown-Forman or Herradura, or both, on the one hand, and Sazerac, on the other hand,

1 entered into an agreement whereby Sazerac voluntarily gave up its rights to distribute Herradura
2 Brands in the United States. Mrs. di Grazia further alleges that in exchange for giving up those
3 rights, Sazerac received a substantial payment or other valuable consideration from either Brown-
4 Forman or Herradura, or both, based on the profits Sazerac anticipated realizing from the sale of
5 Herradura Brands it expected to purchase through the remaining term of the Sazerac-Herradura
6 Agreement. Mrs. di Grazia claims that she is legally and equitably entitled to a portion of that
7 payment or valuable consideration that Sazerac received in lieu of purchases of the Brands it
8 otherwise would have made. Sazerac disputes Mrs. di Grazia's characterization of these events
9 and asserts that, under the express terms of the Sazerac-di Grazia Agreement and the Sazerac-
10 Herradura Agreement, it is not obligated to make any further payments to Mrs. di Grazia.
11 Sazerac has made no additional payments to Mrs. di Grazia since on or about October 2006.

12 Mrs. di Grazia initiated this lawsuit on February 20, 2008, in the Superior Court of
13 the State of California, County of Monterey. On March 21, 2008, Sazerac removed the case to
14 this Court, and on March 28, 2008 (Dkt. No. 1), Sazerac filed a Motion to Dismiss (Dkt. No. 7).
15 Mrs. di Grazia opposed the motion (Dkt. No. 11) and the Court heard oral argument on June 9,
16 2008, taking the matter under submission (Dkt. No. 13). As a result, Sazerac has not yet
17 answered the Complaint.

18 **Issues.** The principal factual disputes between the parties are set forth above in the
19 "Brief Chronology." *See supra* pp. 2-3. There are no factual disputes as to the existence of the
20 contracts, the execution of the contracts, or the parties to the contracts. Resolution of this matter
21 will turn on the parties' rights and obligations under the subject contracts and their equitable
22 rights and obligations otherwise imposed by law, if any, and on whether Mrs. di Grazia's rights
23 obligate Sazerac to make additional payments to Mrs. di Grazia. Should Sazerac be found liable
24 on any of Mrs. di Grazia's claims, the parties anticipate there will be a factual dispute concerning
25 the calculation of damages.

1 **3. LEGAL ISSUES**

2
3 **Plaintiff's statement.** In Mrs. di Grazia's view, the principal legal issues in
4 dispute are:

5 a. Whether Sazerac breached its contractual duty to pay her "based upon
6 purchases of the Brands by Sazerac" when it failed to pay her after receiving a substantial
7 payment or other valuable consideration from either Brown-Forman or Herradura in lieu of
8 purchases of the Herradura Brands it otherwise would have made during the remaining term of
9 the Sazerac-Herradura Agreement.

10 b. Whether by voluntarily giving up its distribution rights of Herradura
11 Brands in exchange for a substantial payment or other valuable consideration Sazerac breached
12 the implied covenant of good faith and fair dealing in the contract with Mrs. di Grazia by injuring
13 her right to receive the benefits of the agreement. *Andrews v. Mobil Aire Estates*, 125 Cal. App.
14 4th 578, 589 (2005); *Carma Developers Inc. v. Marathon Development Cal. Inc.*, 2 Cal 4th 342,
15 374 (1992).

16 c. Whether by voluntarily giving up its distribution rights of Herradura
17 Brands in exchange for a substantial payment or other valuable consideration Sazerac has unjustly
18 enriched itself. *First Nationwide Savings v. Perry*, 11 Cal. App. 4th 1657, 1669-70 (1992);
19 *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 794 (2003).

20 d. Whether by voluntarily giving up its distribution rights of Herradura
21 Brands in exchange for a substantial payment or other valuable consideration Sazerac breached
22 the duty it owed Mrs. di Grazia, under the Sazerac-Herradura Agreement as incorporated into the
23 Sazerac-di Grazia Agreement, to "use its best efforts to import, sell, market and distribute" the
24 Brands. *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258 (S.D.N.Y 1978), *aff'd*, 601 F.2d 609
25 (2d Cir. 1979); *Cates Constr. v. Talbot Partners*, 21 Cal. 4th 28, 40 (1999); *Shaw v. Regents of*
26 *University of California*, 58 Cal. App. 4th 44, 54 (1997).

27 e. Whether by voluntarily giving up its distribution rights of Herradura
28 Brands, Sazerac breached an implied covenant to continue purchasing Herradura Brands. *College*

1 *Block v. Atlantic Richfield Co.*, 206 Cal. App. 3d 1376 (1988); *Cousins Investment Co. v.*
 2 *Hastings Clothing Co.*, 45 Cal. App. 2d 141 (1941).

3 f. Whether Mrs. di Grazia may maintain a claim for breach of contract as a
 4 third-party beneficiary of the Sazerac-Herradura Agreement. *Souza v. Westlands Water Dist.*,
 5 135 Cal. App. 4th 879, 891 (2006); Cal. Civ. Code § 1559; *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d
 6 936, 943 (1976).

7 **Defendant's statement.** In Sazerac's view, the principal legal issues in dispute
 8 are:

9 a. Whether Mrs. di Grazia is entitled to any further payments from Sazerac
 10 when: (i) the Sazerac-di Grazia Agreement states that such payments shall be "based upon
 11 purchases of the Brands by Sazerac"; (ii) the Sazerac-di Grazia Agreement expressly defines the
 12 terms "purchases" as "deemed to have occurred when ownership of the Brands has transferred
 13 from Herradura to Sazerac at the F.O.B. point"; and (iii) Mrs. di Grazia does not allege that
 14 Sazerac has made any "purchases" from Herradura for which she (or her husband) have not been
 15 paid pursuant to the Sazerac-di Grazia Agreement. *Levi Strauss & Co. v. Aetna Casualty and*
 16 *Surety Co.*, 184 Cal. App. 3d 1479, 1486 (1986); *Walnut Creek Pipe Dist. v. Gates Rubber Co.*
 17 *Sales Div.*, 228 Cal. App. 2d 810, 815 (1964).

18 b. Whether any of Mrs. di Grazia's claims can survive when Sazerac has not
 19 breached any specific term of either the Sazerac-di Grazia Agreement or the Sazerac-Herradura
 20 Agreement. *Gulf Ins. Co. v. Hi-Voltage Wire Words, Inc.*, 388 F. Supp. 2d 1134, 1136-37 (E.D.
 21 Cal. 2005).

22 c. Whether Mrs. di Grazia can rely on the "best efforts" clause in the Sazerac-
 23 Herradura Agreement when she is not a party to that agreement and that agreement is not
 24 incorporated in the Sazerac-di Grazia Agreement. *Shaw v. Regents of University of California*, 58
 25 Cal. App. 4th 44, 54 (1997).

26 d. Whether the "best efforts" clause in the Sazerac-Herradura Agreement
 27 requires Sazerac to maximize purchases and sales when the agreement itself states that "[s]uch
 28 efforts shall be directed toward establishing and maintaining the Brands as premium products in

the distilled spirits industry.” *National City Police Officers’ Assn. v. City of National City*, 87 Cal. App. 4th, 1274, 1279 (2001).

e. Whether the implied terms alleged by Mrs. di Grazia may vary the express terms of the Sazerac-di Grazia Agreement. *Carma Developers, Inc. v. Marathon Development Cal. Inc.*, 2 Cal. 4th 342, 374 (1992).

f. Whether Mrs. di Grazia may maintain a claim for breach of contract as a third-party beneficiary of the Sazerac-Herradura Agreement. *Souza v. Westlands Water Dist.*, 135 Cal. App. 4th 879, 891 (2006); Cal. Civ. Code § 1559; *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 936, 943 (1976).

4. **MOTIONS**

On March 28, 2008, Sazerac filed a Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On May 13, 2008, Mrs. di Grazia opposed this Motion; on May 23, 2008, Sazerac replied. On June 6, 2008, the Court held a hearing on this Motion and took it under submission. The Court has not yet issued a ruling on this Motion. There are no other motions pending and no additional motions anticipated by the parties at this time.

5. **AMENDMENT OF PLEADINGS**

Neither party expects to add any additional parties, claims, or defenses at this time, but each party reserves its right to seek leave to do so during the course of this litigation.

6. **EVIDENCE PRESERVATION**

Counsel have advised their respective clients to refrain from any document destruction, and to cease any document destruction program and any programmatic erasure of voice-mail, e-mail, and other electronically stored material.

7. **DISCLOSURES**

The parties have jointly agreed that their initial disclosures under Rule 26(a) of the Federal Rules of Civil Procedure will be due 21 days from the day that the Court rules on Sazerac’s Motion to Dismiss.

8. **DISCOVERY**

No discovery has been taken to date.

At this time, the parties do not intend to conduct discovery in separate phases, nor do the parties intend to limit or modify the Federal Rules of Civil Procedure or this Court's Local Rules regarding discovery, but reserve the right to seek leave to do so during the course of this action. The parties expect that discovery in this case will involve material that is considered confidential and proprietary to one or both parties and in such an event, intend to propose a stipulated protective order for entry by the Court.

The parties propose that discovery be conducted on the schedule outlined in Paragraph 17, *supra*.

9. CLASS ACTIONS

This is not a class action.

10. RELATED CASES

There are no related cases.

11. RELIEF

Mrs. di Grazia seeks the following relief:

a. A monetary award in excess of at least \$7 million, consisting of Mrs. di Grazia's estimated share of all proceeds or other valuable consideration received by Sazerac in connection with its relinquishment of its rights to distribute the Herradura Brands, as well as Mrs. di Grazia's alleged actual damages including lost profits. The actual amount of Mrs. di Grazia's damages is subject to facts that are in dispute, including the amount of and basis for the payment or other valuable consideration Sazerac received in exchange for relinquishing its rights;

b. An award of attorneys' fees and costs; and

c. Such other relief as the Court deems just and proper.

Sazerac will state the relief it seeks at the time it answers the Complaint, should the Court deny, in whole or in part, Sazerac's Motion to Dismiss.

12. SETTLEMENT AND ADR

The parties have agreed to participate in Court-sponsored Mediation pursuant to ADR L.R. 6 and have filed a stipulation to that effect. (Dkt. No. 14.) They agreed to hold the ADR session by 120 days from the date of the Court's ruling on Sazerac's Motion to Dismiss.

Both parties have complied with ADR L.R. 3-5 and filed their executed ADR Certification (Dkt. Nos. 15 and 16).

The parties agree that a meaningful document exchange is necessary to position the parties to negotiate a resolution, and they anticipate that there may be discovery disputes to resolve prior to mediation, including without limitation, that Sazerac may dispute the relevance of its contract(s) with Brown-Forman Corp. (or others) related to its relinquishment of the distribution rights that are the subject of Mrs. di Grazia's Complaint.

13. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES

Not all of the parties consent to have a trial of this case by a Magistrate Judge.

14. OTHER REFERENCES

The parties do not believe that this case is suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

15. NARROWING OF ISSUES

At this time, the parties have not identified opportunities to narrow the issues by agreement or motion, nor do they seek to bifurcate any issues, claims or defenses, but reserve their right to seek leave to do so during the course of this action.

16. EXPEDITED SCHEDULE

The parties do not at this time see a need for any expedited or streamlined procedures.

17. SCHEDULING

The parties propose the following schedule:

Initial Disclosures Due: 21 days after ruling on Motion to Dismiss
(*approx. July 10-21*)

Mediation to be held by: 120 days after ruling on Motion to Dismiss
(*approx. November 20-29, 2008*)

Expert Reports due: October 17, 2008

Rebuttal expert reports due: November 7, 2008

Discovery cut-off: December 1, 2008

Dispositive Motions to be heard: February 2, 2009

Preliminary Pre-Trial Conference: February 16, 2009

Final Pre-Trial Conference: March 2, 2009

Trial-ready date: March 16, 2009

18. TRIAL

The parties request a trial by jury. The parties expect the trial to last 3-5 day(s).

19. NON-PARTY INTERESTED ENTITIES OR PERSONS

Mrs. di Grazia will certify, pursuant to Civil Local Rule 3-16, that as of this date, other than the named parties, there is no such interest to report.

Sazerac will certify, pursuant to Civil Local Rule 3-16, that as of this date, other than the named parties, there is no such interest to report.

20. OTHER INFORMATION PROMOTING THE JUST, SPEEDY, AND INEXPENSIVE DISPOSITION OF THIS MATTER

There is no additional information to present in this category at this time.

Dated: June 24, 2008

MANATT, PHELPS & PHILLIPS, LLP

By: /s/ Andrew A. Bassak

Andrew A. Bassak
Attorneys for Plaintiff
DEBORAH DI GRAZIA

Dated: June 24, 2008

COOLEY GODWARD KRONISH LLP

By: /s/ Michael A. Attanasio

Michael A. Attanasio
Attorneys for Defendant
SAZERAC COMPANY, INC.

Filer's Attestation: Pursuant to General Order No. 45, Section X(B) regarding signatures, Andrew A. Bassak hereby attests that concurrence in the filing of this document has been obtained.

CASE MANAGEMENT ORDER

The parties' Joint Case Management Conference Statement and Proposed Order is hereby adopted as the Case Management Order for the case, and the parties are ordered to comply with this Order.

Dated: _____, 2007

HON. JAMES WARE
UNITED STATES DISTRICT JUDGE